NOS. 98-1701 AND 98-1706

In The Supreme Court Of The United States

OCTOBER TERM, 1998

UNITED STATES OF AMERICA, *PETITIONER*,

v.

GARY LOCKE ET. AL., *RESPONDENTS*.

INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO), *PETITIONER*,

v.

GARY LOCKE ET AL., *RESPONDENTS*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE RESPONDENTS' BRIEF IN OPPOSITION

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June 28, 1999

PARTIES LISTED

Petitioners:

The International Association of Independent Tanker Owners (Intertanko).

The United States of America.

State Respondents:

Gary Locke, Governor of the State of Washington.

Christine O. Gregoire, Attorney General of the State of Washington.

Barbara Herman, Administrator of the Washington State Office of Marine Safety. Ms. Herman was succeeded by Tom Fitzsimmons, Director, Washington State Department of Ecology, when the Office of Marine Safety was merged into the Department of Ecology. Wash. Rev. Code § 88.46.921.

Respondents

James H. Krider, Snohomish County Prosecuting Attorney.

Natural Resources Defense Council.

Washington Environmental Council.

Ocean Advocates.

David McEachran, Whatcom County Prosecuting Attorney; Norman Maleng, King County Prosecuting Attorney; K. Carl Long , Skagit County Prosecuting Attorney. Mr. Long was succeeded in office by Tom Verge. In the district court, the parties entered into a stipulation that these three defendants would not participate in the case, but would be bound by the decision of the court.

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STATEMENT

The environmental damage caused by oil spills can be catastrophic. In 1989, the *Exxon Valdez* tore open on rocks and dumped 11 million gallons of oil into Prince William Sound, Alaska. The *Exxon Valdez* spill galvanized Congress to attack the problem of oil pollution from tankers by enacting the Oil Pollution Act of 1990, Pub. L. No. 101-380, August 18, 1990, 104 Stat. 484 (OPA 90).[1] OPA 90 was designed to prevent vessel-caused oil pollution by addressing all aspects of the problem including prevention, response, liability, and compensation for natural resource damages.

Washington followed Congress' lead in 1991 and exercised its police power to enact a comprehensive law to prevent pollution by providing the Best Achievable Protection (BAP) for state waters. The BAP rules are designed to prevent oil spills from tankers and are consistent with federal and international standards. This case does not require review. The decision of the Court of Appeals upholding the BAP rules[2] correctly applies the principles governing preemption set down by this Court, and there is no conflict among the Courts of Appeal or with a decision of this Court.

A. Washington's Waters Are A Priceless Resource And Navigation In Puget Sound Is Difficult

Washington's waters contain some of the richest and most diverse eco-systems in the world. The outer coast

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[1] The main provisions of OPA 90 are set out in the Appendix to the State Respondents' Brief In Opposition, which is a separate document. Appendix F provided by Intertanko contains OPA 90, but excludes Title I of the Act. Intertanko includes the provisions of Title I in the codified material in Appendix E at pages 114a-183a. Since OPA 90 is an important part of the case, it may be convenient for the Court to have a copy of OPA 90 that contains all the main provisions.

[2] The Court of Appeals did strike down one BAP rule dealing with technology. Wash. Admin. Code § 317-21-265; *Intertanko v. Locke*, 148 F.3d 1053, 1066-67 (1998), Intertanko App. A at 29a-32a. State respondents do not seek review of this ruling.

consists of wave-exposed rocky headlands separated by stretches of sand and gravel beaches. It includes two large estuaries, Grays Harbor and Willapa Bay. Puget Sound is an internal sea with habitat ranging from muddy bays to open rocky shores. The Strait of Juan de Fuca is a transition zone between the wave-exposed coast and the quieter Puget Sound waters. These waters support hundreds of different species of plants and animals. Shoreline vegetation covers 2,500 miles of Washington coast. There are 125 species of birds that spend some part of the year in Washington waters. Washington is also home to 5 species of salmon and 30 other species of fish, plus shrimp, clams, oysters, and scallops.

An oil spill in these waters would be devastating. Washington's waters are particularly vulnerable to damage from a spill. In Puget Sound, the water exchange is limited and sediments in shallow areas would be heavily contaminated. Even on the rocky coast damage could be extensive because it is home to long-lived, slow-growing species, such as mussels, that do not disperse well. Birds are particularly vulnerable. For example, between 175,000 and 300,000 Common Murres were killed in the *Exxon Valdez* spill. Washington's fishery could also be severely damaged through destruction of habitat and genetic damage to future generations.

It is also significant that most tanker traffic passes through Puget Sound to refineries located in the north and south. Puget Sound is a narrow body of water with navigational obstacles. Tankers going north must pass through Rosario Strait. The strait is so narrow that all vessels, both incoming and outgoing, must share a single lane. Tankers headed for the two Anacortes refineries must then pass through the narrow Guemes Channel. The currents in this channel are extremely strong, and the area is subject to frequent fog and a significant range of tides. Tankers headed north to the Cherry Point and Ferndale refineries must pass obstacles such as Peapod and Lummi Rocks. Tankers going south to Tacoma transit a somewhat broader waterway but the trip is long. It takes approximately 8 hours to travel from the Port Angeles

pilot station to Tacoma. The tanker must contend with significant congestion, including ferries crossing the traffic lanes and obstructions close to the western side of the southbound traffic lane.

B. The BAP Rules Were Adopted To Protect Washington's Priceless Marine Environment

In 1991, the Washington Legislature acted to protect "some of the most unique and special marine environments in the United States". 1991 Wash. Laws ch. 200, § 101. The Legislature recognized that these marine environments were threatened by "billions of gallons of crude oil and refined petroleum products . . . transported by vessel on the navigable waters of the state [each year]". *Id.* The Legislature concluded that "prevention is the best method to protect the unique and special marine environments in this state". *Id.*

To safeguard Washington waters, the Legislature created the Office of Marine Safety (OMS). 1991 Wash. Laws ch. 200, § 402.[3] OMS was directed to establish standards for spill prevention plans to provide "the best achievable protection from damages caused by the discharge of oil into the waters of the state". Wash. Rev. Code § 88.46.040(3). Owners and operators of tankers operating in Washington waters are required to file a spill prevention plan that meets the standards established by OMS. Wash. Rev. Code § 88.46.040. It is unlawful to operate a tanker in Washington waters without an approved prevention plan, and the statute provides civil and criminal penalties for such a violation. Wash. Rev. Code § 88.46.080-.090.[4] Under the rules, OMS conducts inspections

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[3] In 1991, the Office of Marine Safety was abolished and its powers and functions were transferred to the Department of Ecology. Wash. Rev. Code § 88.46.921.

[4] The law also provides that OMS may deny entry into state waters to any covered vessel that does not have a spill prevention plan. Washington has neither the authority nor the ability to actually deny entry into state waters. The state enforcement power is limited to civil and criminal penalties.

of tanker vessels in port in state waters to ensure that the tanker is complying with its approved plan. Wash. Admin. Code § 317-21-550. OMS does not perform the functions of the Coast Guard, and if a violation of a Coast Guard or other federal rule is discovered, it is to be reported to the appropriate agency. Wash. Rev. Code § 88.46.030(4).[5]

The oil spill prevention standards adopted by OMS as BAP rules were developed with the assistance of an advisory group that included the Coast Guard and tanker operators and managers. According to the Coast Guard, 60 to 80 percent of marine casualties are caused by human error. The BAP rules[6] address these human factors in three areas.

1. Operating Procedures—Wash. Admin. Code § 317-21-200 to –225

The operating procedures set out requirements for the operation of a tanker in the narrow congested waters of Puget Sound. For example, Wash. Admin. Code § 317-21-200(1) requires that navigation watch on the bridge consist of two licensed deck officers; and Wash. Admin. Code § 317-21-200(1)(a) requires that when the tanker is operating in restricted visibility, as determined by the master of the vessel, three licensed deck officers are required. The purpose is to avoid collisions and groundings—the two principal causes of catastrophic oil spills. Wash. Admin. Code § 317-21-205(1) requires the crew to constantly monitor navigation equipment and record the tanker's position every 15 minutes. A tanker will travel about 4 miles in this time, and the standard is designed to ensure that the tanker stays on course. Wash. Admin. Code § 317-21-210(1) provides that tankers without

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[5] The rules also prohibit OMS from boarding a tanker for the purpose of making a substantial risk determination that the vessel poses a threat to the environment. Wash. Admin. Code § 317-31-210(3). The purpose of a tanker inspection is to determine if it complies with its spill prevention plan.

[6] The BAP rules are located in Intertanko's Appendix J (pages 307a-348a).

automatic switching gear for standby generators must operate with a standby generator running. Electricity powers most of a tanker's navigation equipment. Frequently, loss of electricity also results in a loss of propulsion. If power is lost in the main generator, standby power must be immediately available to prevent a collision or grounding. Wash. Admin. Code § 317-21-215 requires prearrival tests and inspections of critical systems, such as navigation equipment and steering systems. A failure of any of these systems, once a tanker is in Puget Sound, could also result in a collision or grounding.

2. Personnel Policies—Wash. Admin. Code § 317-21-230 to –255

Since 60 to 80 percent of accidents are caused by human error, training is critical to prevent oil spills. Wash. Admin. Code § 317-21-230(2) requires new personnel, who have not served on the same type of tanker, to receive an orientation of the new tanker. This will familiarize a new crewmember with the tanker layout. Wash. Admin. Code § 317-21-230(3) and (4) require position-specific and refresher training. Wash. Admin. Code § 317-21-235 deals with illicit drugs and alcohol. Washington has a zero tolerance policy for the use of illicit drugs or alcohol while a tanker is operating in Washington waters. Washington primarily follows the federal standard and applies it to all vessels, including foreign flag vessels. The main difference is that Washington requires random testing for drugs and alcohol. The purpose is to prevent crewmembers from becoming drug-impaired or intoxicated so they are unable to perform their duties.

3. Management Practices—Wash. Admin. Code § 317-21-260

Management oversight is a critical part of environmental protection. Wash. Admin. Code § 317-21-260 requires that vessel owners and operators have a management program that meets the International Maritime Organization's International Safety Management Code. It also requires preventive maintenance and plans for inspecting critical areas

of the vessel. The purpose of the management practices is to break the chain of human error that could endanger a tanker due to collision, grounding, or equipment failure.

C. Congress Enacted OPA 90 To Prevent And Respond To Oil Spills From Tankers

Washington adopted the BAP rules after Congress enacted OPA 90. Prior to the *Exxon Valdez* accident, there had been other smaller oil spills in the United States and there were several bills in Congress addressing the issue. The *Exxon Valdez* served as a wake-up call for Congress to take action, and Congress determined that spill prevention was critical. In the words of one Senate Report:

> "The oil spills over the past five months clearly show that we are not using–or have not yet developed–technology capable of containing spills of less than a million gallons, let alone spills the size of the *Exxon Valdez*. The spills of less than one million gallons also demonstrated that any oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. *Consequently, preventing oil spills is more important than containing and cleaning them up quickly.*" S. Rep. No. 101-94, 101st Cong., 1st Sess., pp. 2-3 (1990) (second italics ours), *reprinted in* 1990 U.S.C.C.A.N. at 724.

OPA 90 imposed substantial new requirements to prevent oil pollution from tankers. Prevention measures included review of drug and alcohol abuse in issuing licenses, certificates of registry, and merchant mariners documents;[7] random drug testing and suspension of licenses, certificates of registry, and merchant mariners documents for drug and alcohol abuse;[8] and a requirement that working hours on a tanker be no more than 15 hours in any 24-hour period, or more than 36 hours in any 72-hour period.

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[7] OPA 90 § 4101, State App. at 51a-52a.

[8] OPA 90 § 4103, State App. at 54a-57a.

As part of these prevention measures, Congress departed from international standards to provide increased protection for United States waters. Congress required tankers be constructed with double hulls by January 1, 2015.[9] This requirement applied to both United States and foreign flag tankers.

According to the United States, this was the only departure from international standards. United States Pet. at 8-9. This claim is simply not accurate. Until the double hull requirement went into effect, the Secretary of Transportation was required to adopt rules for single hull tankers operating in United States waters to "provide as substantial protection to the environment as is economically and technologically feasible". OPA 90 § 4115(b), State App. at 77a-78a. Thus, Congress wanted greater protection for United States waters until the double hull tankers came on line. In 1996, the Coast Guard issued the final rule to provide this additional protection. 61 Fed. Reg. 39770 (1996). In its rulemaking for single hull tankers, the Coast Guard responded to comments that it was "undermining the international process; that competency and manning requirements fall under flag state jurisdiction; and the [rule] goes beyond international requirements in some cases". 61 Fed. Reg. 39771 (1996). The Coast Guard responded by stating: "Where international standards do not address certain operations, the Coast Guard has met the intent of Congress by issuing these rules to ensure that specific vessels reduce their accident risk." 61 Fed. Reg. 39771 (1996).

In addition, OPA 90 required the Secretary of Transportation to adopt rules governing tanker operations with the auto-pilot engaged or with an unattended engine room.[10] Congress also required the Secretary to designate waters on which tankers must have two licensed deck officers on the

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[9] OPA 90 § 4115(a), State App. at 72a-77a.

[10] OPA 90 § 4114(a), State App. at 70a.

bridge.[11] Although such manning and operation issues usually fall within the jurisdiction of the flag state, the Coast Guard concluded that the rules should "apply to foreign flag tankers and U.S. tankers sailing on registry because these tankers pose a similar risk to the environment". 58 Fed. Register 27628 (1993). Under the rule, a tanker must have two licensed deck officers on watch while operating in United States waters. One licensed engineer must keep watch in machinery spaces or in the main control space. The auto pilot may be engaged only under certain conditions. 33 C.F.R. § 164.13.

In addition to these prevention measures, OPA 90 contained new provisions imposing liability for spills and damage to natural resources.[12] OPA 90 also imposed new requirements for demonstrating financial responsibility.[13] These provisions also departed from the international oil pollution liability and compensation regime. OPA 90 also provided new authority for the President to ensure effective removal and mitigation in the event of an oil spill.[14]

In enacting all these new requirements, Congress specifically considered the question of preemption and expressly declined to preempt state law. OPA 90 section 1018 provides, in part:

> "(a) PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT.—*Nothing in this Act* or the Act of March 3, 1851 shall—
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> (1) *affect, or be construed or interpreted as preempting, the authority of any State* or political subdivision *thereof from imposing any additional liability or requirements with respect to*—

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[11] OPA 90 § 4116(b), State App. at 84a.

[12] OPA 90 § 1002-1006, State App. at 8a-25a.

[13] OPA 90 § 1016, State App. at 39a-43a.

[14] OPA 90 § 4201, State App. at 86a-95a.

(A) *the discharge of oil or other pollution* by oil within such State; or

(B) any removal activities in connection with such a discharge; or

(2) affect, or be construed or interpreted to affect or modify in any way the obligations or liabilities of any person under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) or State law, including common law.

. . . .

(c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALTIES.—Nothing in this Act, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), *shall in any way affect, or be construed to affect, the authority of* the United States or *any State* or political subdivision thereof—

(1) *to impose additional liability or additional requirements*: or

(2) to impose, or to determine the amount of, any fine or penalty (whether criminal or civil in nature) for any violation of law;

relating to the discharge, or substantial threat of a discharge, of oil." OPA 90 § 1018(a), (c) (italics ours), State App. at 46a-47a, 33 U.S.C.A. § 2718.

Section 1018 is a broadly worded statement of Congress' intent to preserve state authority.

REASONS WHY THE PETITIONS SHOULD BE DENIED

This Court should deny the petitions because the Court of Appeals correctly applied the preemption analysis laid down by this Court. There is no conflict with a decision of this Court or among the Courts of Appeals.

A. Principles Governing The Preemption Of State Law

The starting place for understanding this case is the law governing preemption. "The purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The question of preemption "starts with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress". *Cipollone*, 505 U.S. at 516 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal punctuation omitted).

There are three ways to overcome the presumption in favor of state law. The first is express preemption. A state law is preempted if Congress expressly so states in the language of the federal statute. *Cipollone*, 505 U.S. at 516 ("Congress' intent may be 'explicitly stated in the statute's language'"); *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989). However, "Congress' enactment of a provision defining the preemptive reach of a statute *implies that matters beyond that reach are not preempted*". *Cipollone*, 505 U.S. at 517 (italics ours).

The second is implied field preemption. In the absence of an express congressional command, preemption may be implied

> "because the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it [or] because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject". *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230).

Although pervasive regulation may give rise to field preemption, the Court has rejected the "contention that pre-

emption is to be inferred merely from the comprehensive character of the federal work incentive provisions". *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973).

The third way to overcome the presumption in favor of state law is conflict preemption. Even if Congress has not expressly preempted state law or impliedly occupied the field, the "state law is pre-empted if that law actually conflicts with federal law". *Cipollone*, 505 U.S. at 516. A state law is in conflict with a federal law to the extent "it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress'". *California*, 490 U.S. at 100-01 (citations omitted).

B. Nature Of The Petitions' Preemption Claims

At the outset, neither Intertanko nor the United States claim that Congress has expressly stated its intent to preempt state health and safety laws that apply to oil tankers.[15] Although they cite various federal statutes and Coast Guard rules, petitioners focus on the Ports and Waterways Safety Act of 1972 (PWSA), Pub. L. No. 92-340, 86 Stat. 424 (1972), as amended. The claims of Intertanko and the United States, with respect to the PWSA, are distinctly different.

Intertanko's main claim is that Title II of the PWSA preempts the field of tanker regulation in the area of design, construction, equipment, and operation. According to Intertanko, Title I of the PWSA is not directly implicated in this litigation. Intertanko Br. at 3. Under Intertanko's theory, all state rules that touch the field of tanker design, construction, equipment, and operation are preempted.

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[15] Intertanko and the United States challenge the Court of Appeals decision that the Coast Guard simply cannot declare that state laws are preempted. This issue is discussed below at pages 28-30.

On the other hand, the United States does not maintain that the entire field has been preempted. Instead, the United States' claim appears to be based on conflict preemption. The Government argues that, under Title I of the PWSA, the state cannot regulate if the Coast Guard has adopted rules. Under this analysis, some state rules are valid and others are not. The United States argues that the case should be remanded so the district court can perform a rule by rule analysis.

Both petitioners cite a number of treaties to which the United States is a signatory. Neither petitioner appears to claim that these treaties preempt state law by themselves. Rather, petitioners focus on statutes and Coast Guard rules implementing the treaties. Petitioners also argue that the treaties illustrate Congress' desire for uniformity, which they contend is inconsistent with state regulation.

C. Title II Of The PWSA Does Not Preempt The Field Of Tanker Operations

The Court of Appeals ruled that Title II of the PWSA preempted the field of tanker design, construction, and equipment, but did not preempt the field of tanker operations. *Intertanko*, 148 F.3d at 1064-66, Intertanko App. at A 25a-29a. Intertanko argues that this holding conflicts with *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). It does not.

1. The Court Of Appeals Analysis Of Implied Field Preemption Does Not Conflict With *Ray*

Ray involved a Washington tanker law that imposed four requirements. First, the state required tankers from 40,000 to 125,000 dead-weight tons (DWT) to have certain standard safety features, including shaft horsepower in the ratio of 1 horsepower to each 2½ DWT; twin screws; double bottom; two radars in working order and operating, one of which must be collision avoidance radar; and other navigational position location systems as may be prescribed from time to time by the Board of Pilotage Commissioners. *Ray*, 435 U.S. at 160.

Second, the statute required a tug escort for any vessel that did not have the required safety features. *Id.*

Third, tankers of at least 50,000 DWT, engaged in either domestic or foreign trade, were required to take on pilots licensed by the state when navigating in Puget Sound. *Id.* at 158.

Fourth, the state excluded from Puget Sound, under any circumstances, a tanker in excess of 125,000 DWT, a so-called "supertanker". *Id.* at 173.

The Court struck down the first and fourth requirements because they intruded on the field of tanker construction and design where uniformity was important.[16] The Court said:

> "Enforcement of the state requirements would at least frustrate what seems to us to be the evident congressional intention to establish a *uniform federal regime controlling the design of oil tankers.*" *Ray*, 435 U.S. at 165 (italics ours).

However, the Court was careful to limit the broad effects of field preemption to design and construction stating:

> "This statutory pattern shows that Congress, *insofar as design characteristics are concerned*, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States. This indicates to us that *Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.* In particular, as we see it, Congress did not anticipate that a vessel found to be in compliance with the Secretary's design and construction regulations and holding a Secretary's permit, or its equivalent, to carry the relevant cargo

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[16] The Court also analyzed the ban on supertankers under Title I of the PWSA. *See infra* p. 24.

> would nevertheless be barred by state law from operating in the navigable waters of the United States on the *ground that its design characteristics constitute an undue hazard.*" *Ray,* 435 U.S. at 163-64 (italics ours).

The Court specifically limited its ruling "insofar as design characteristics are concerned".

Moreover, the Court upheld the operational requirement that registered vessels in international trade take on a state pilot. *Id.* at 159-60 ("it is equally clear that [the states] are free to impose pilotage requirements on registered vessels entering and leaving their ports"). In sustaining this requirement, the Court specifically noted the requirement for a state pilot was not a design requirement. The Court said:

> "Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned *does not mean that it is free to ignore otherwise valid state* or federal *rules* or regulations *that do not constitute design or construction specifications. Registered vessels*, for example, as we have already indicated, *must observe Washington's pilotage requirement.*" *Id.* at 168-69 (italics ours).

The Court also sustained the requirement for a tug escort. Once again, the Court specifically noted that the requirement for a tug escort was an *operating requirement*, not a design requirement. The Court said:

> "*A tug escort provision is not a design requirement*, such as is promulgated under Title II. *It is more akin to an operating rule* arising from the peculiarities of local waters[.]" *Id.* 171 (italics ours).

Ray stands for the proposition that Congress impliedly preempted the field of tanker design and construction. The fact that *Ray* upheld the pilotage and tug escort requirements refutes Intertanko's claims that operational requirements are preempted by Title II of the PWSA.

2. The Court Of Appeals Decision Is Consistent With Other Decisions Applying *Ray*

Review also is not warranted because the Court of Appeals decision is consistent with other decisions applying *Ray*. For example, in *Chevron U.S.A., Inc. v.* Hammond, 726 F.2d 483 (9th Cir. 1984), *cert. denied sub nom., Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985), the court upheld an Alaska statute that prohibits oil tankers from discharging ballast into the territorial waters of Alaska, if the ballast had been stored in the vessel's oil cargo tanks. The plaintiff claimed that this prohibition violated the PWSA, as amended. In sustaining the imposition of this operating requirement, the court interpreted *Ray* as limiting the issue of implied field preemption to design and construction:

> "*The [Ray] Court's finding of preemption is specifically limited to the regulation of vessel 'design characteristics'* and thus does not control the outcome of the present case involving ocean pollutant discharges. As a matter of fact, the court specifically explained that tankers must meet 'otherwise valid state or federal rules or regulations that do not constitute design or construction specifications.'" *Chevron*, 726 F.2d at 487 (footnote omitted) (italics ours).

Intertanko suggests that this case also presents an opportunity to review *Chevron* based on Justice White's dissent from the denial of certiorari in that case. Intertanko Pet. at 18 n.19. In fact, Justice White agreed that in *Ray* "we held that federal regulations governing oil tanker design and construction promulgated under Title II of the PWSA preempt more stringent state regulations covering the same subject matter". *Sheffield*, 471 U.S. at 1141. Justice White also noted:

> "The need for national uniformity in the area of standards for tanker operations, the [*Ray*] court concluded, is not so great as the need for uniformity in standards governing tanker operation and design; for while a tanker can under some circumstances alter its

> operating practices to conform to the requirements of the State whose territorial waters it is traversing, it cannot alter its construction or design. *Accordingly, the absence of uniform design and construction requirements may be a far more serious impediment to the tanker industry than a lack of uniformity with respect to operations.*" *Sheffield*, 471 U.S. at 1141-42 (italics ours).[17]

Another example of a consistent application of *Ray* is *Beveridge v. Lewis*, 939 F.2d 859 (9th Cir. 1991), which involved a city ordinance that prohibited a vessel from mooring or anchoring within 300 feet of a city wharf during certain months. Once again this was an operational requirement unrelated to design and construction. The plaintiff claimed that this ordinance violated the PWSA. The court began its analysis by acknowledging that the PWSA "now regulates much of the activity on or near navigable waterways". *Beveridge*, 939 F.2d at 861. However, the court concluded that the PWSA did not preempt the field because *Ray* held that "Congress did not so occupy the field of waterways and harbors that the state of Washington could not regulate". *Id.* at 862. "Just as *Ray* refused to find implicit preemption and proceeded to discuss the *actual* conflicts between Washington's Tanker Law and federal regulations, we cannot hold that the PWSA occupies the entire field of regulation of anchorage and mooring." *Beveridge*, 939 F.2d at 863 (italics in original).

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[17] While Justice White recognized the distinction between design and construction and operations, he was concerned that some operational rules were so closely linked with tanker design they would effectively prohibit a tanker from operating in a state's waters just as if the rule prohibited tankers of a certain design. He felt that the discharge of ballast might have such an impact. *Sheffield*, 471 U.S. at 1142 n.3. However, the BAP rules are not related to the design and construction of tankers. Instead, they go to the human factors that are responsible for 60 to 80 percent of marine casualties. Intertanko does not claim that the design and construction of tankers would prohibit them from operating in Washington waters if they complied with the BAP rules. Thus, Justice White's concern about operating procedures is not present in this case.

Even the United States appears to disagree with Intertanko's field preemption analysis. Intertanko acknowledges that before the Court of Appeals the United States posited that some BAP rules were valid. Intertanko Pet. at 13 n.15. In its petition, the Government also draws the distinction between field preemption of design and construction requirements under Title II of the PWSA and preemption of operational requirements under Title I.

> "In holding that the State's attempts to regulate the design of oil tankers were preempted, the [*Ray*] Court concluded that, in Title II of the PWSA . . . Congress 'has entrusted to the Secretary of Transportation the duty of determining which oil tankers are sufficiently safe to be allowed to proceed in the navigable waters of the United States.' 435 U.S. at 163. . . . With respect to personnel, staffing, and operational requirements, the Court concluded that Washington's regulations were not automatically preempted by Title I of the PWSA[.]" U.S. Pet. at 7-8.

There is no basis for Intertanko's claim that Title II of the PWSA preempts the field of tanker operations and invalidates the BAP rules. Intertanko's petition should be denied.

D. The BAP Rules Are Not Subject To Conflict Preemption Because They Do Not Frustrate The Objectives Of Congress

The Government claims that some of the BAP Rules violate Title I of the PWSA, because they are in conflict with Coast Guard rules. A state law is in conflict with a federal law to the extent "it actually conflicts with federal law, that is, *when compliance with both state and federal law is impossible*, or when the state law '*stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress*'". *California,* 490 U.S. at 100-01 (citations omitted) (italics ours). In discovery at the district court, Intertanko agreed that it was not impossible to comply with the BAP rules, federal law, and Coast Guard rules. Nor

does the Government appear to be arguing impossibility. The question is whether the BAP rules stand as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. They do not. The Court of Appeals was correct in holding that the BAP rules are consistent with the purpose of Congress, which is to prevent oil spills from tankers. *Intertanko*, 148 F.2d at 1062-63, Intertanko App. A at 21a-24a.

1. The Objective Of Congress Is To Prevent Oil Spills From Tankers Including Additional State Requirements

Stung by the *Exxon Valdez* spill, Congress acted in OPA 90 to prevent oil spills from tankers on a number of fronts. It imposed the construction requirement of double hulls, it imposed new operating requirements, and set up new liability, compensation, and financial responsibility schemes. Congress also recognized that states have an important role to play. "The purpose of Congress is the ultimate touchstone of pre-emption analysis." *Cipollone*, 505 U.S. at 516. In OPA 90, Congress directly stated its purpose with regard to preemption. OPA 90 expressly preserves state authority to add additional requirements with regard to a discharge of oil or other pollution, or the substantial threat of a discharge. Section 1018 of OPA 90 provides, in part:

> "(a) PRESERVATION OF STATE AUTHORITIES; SOLID WASTE DISPOSAL ACT.—*Nothing in this Act* or the Act of March 3, 1851 shall—
>
> (1) *affect, or be construed or interpreted as preempting, the authority of any State* or political subdivision *thereof from imposing any additional liability or requirements with respect to*—
>
> (A) *the discharge of oil or other pollution* by oil within such State;
>
> . . . .

> *(c) ADDITIONAL REQUIREMENTS AND LIABILITIES; PENALTIES.—Nothing in this Act*, the Act of March 3, 1851 (46 U.S.C. 183 et seq.), or section 9509 of the Internal Revenue Code of 1986 (26 U.S.C. 9509), *shall in any way affect, or be construed to affect, the authority of* the United States or *any State* or political subdivision thereof—
>
> (1) *to impose additional liability or additional requirements*
>
> . . . .
>
> *relating to the discharge, or substantial threat of a discharge, of oil.*" OPA 90 § 1018(a)(1), (c)(1) (italics ours), State App. at 46-47, 33 U.S.C.A. § 2718(a)(1), (c)(1).

The language of subsections 1018(a)(1) and (c)(1) is very broad. Section 1018(a) states:

> "Nothing in this Act . . . shall (1) affect, or be construed or interpreted as preempting, the authority of any State . . . from imposing any additional . . . requirements with respect to (A) the discharge of oil or other pollution by oil within such state". OPA 90 § 1018(a).

Section 1018(c) states:

> "Nothing in this Act . . . shall in any way affect, or be construed to affect, the authority of . . . any State . . . (1) to impose . . . additional requirements . . . relating to the discharge, or substantial threat of a discharge, of oil". OPA 90 § 1018(c).

On its face, this non-preemptive language includes the provisions of OPA 90 enacted to prevent oil spills. Congress did not carve out discrete aspects of oil spill regulation that states would be allowed to impose. Instead, it used very broad language in subsections 1018(a)(1) and (c)(1) to signify its intent that *no* areas of state authority over the discharge of oil were preempted.

Section 1018 squarely addresses the issue of preemption and provides that states may impose additional liability and additional requirements. Congress' declaration that it is not preempting state authority is significant. As the Court said in *Cipollone*:

> "*When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue*, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority, *there is no need to infer congressional intent to pre-empt state laws* from the substantive provisions' of the legislation." *Cipollone*, 505 U.S. at 517 (citations omitted) (italics ours).

The legislative history of section 1018 leaves no doubt that Congress intended to permit states to impose more stringent oil spill prevention requirements. OPA 90 began as S 686 on the Senate side, and as HR 1465 on the House side. The non-preemptive language in S 686 was in section 106. The report from the Environment and Public Works Committee considering S 686 states:

> "Section 106 of the reported bill explicitly preserves the authority of *any State to impose its own requirements or standards with respect to discharges of oil within such State*. . . .
>
> . . . .
>
> "Preemption has been discussed by the members of the Committee more than any other single issue. S 686 does not embrace any preemption of State oil spill liability laws, State oil spill funds, or State fees, taxes, or penalties used to contribute to such funds. *The long-standing policy in environmental laws of not preempting State authority and recognizing the rights of States to determine for themselves the best way in which to protect their citizens, is clearly affirmed in S. 686.*" S. Rep. No. 101-94, 101st Cong., 1st Sess.,

pp. 17-18 (1989) (italics ours), *reprinted in* 1990 U.S.C.C.A.N. at 739-740.

The Senate passed S 686 and the House passed HR 1465. Since the bills differed, a conference committee was assigned to reconcile the differences. The joint explanatory statement of the conference committee, with regard to section 1018, states:

> "*Section 106 of the Senate amendment and section 1018 of the House bill* are generally similar provisions *preserving the authority of any State to impose its own requirements or standards with respect to discharge of oil within that State*. . . .
>
> The Conference substitute blends the provisions of the House and Senate bills, and adds a new subsection (d) pertaining to the liability of Federal employees.
>
> Thus, subsection (a) of section 1018 of the substitute *states explicitly that nothing in the substitute, or the Act of March 3, 1851* (the Limitation of Liability Act*), shall affect in any way the authority of a State* or local government to *impose additional* liability or other requirements with *respect to oil pollution or to the discharge of oil within that State* . . . .
>
> . . . .
>
> Similarly, subsection (c) clarifies that nothing in the substitute, the Limitation of Liability Act, or in section 9509 of the Internal Revenue Code shall affect in any way the authority of the United States or any State or local government to impose additional liability or requirements, or to determine the amount of, any civil or criminal penalty for any violation of law.
>
> . . . .
>
> The Conference substitute does not disturb the Supreme Court's decision in *Ray v. Atlantic Richfield*

> *Company*, 435 U.S. 151 (1978)." H.R. Conf. Rep. No. 101-653, 101st Cong., 2d Sess., pp. 121-22 (1990) (footnote omitted) (italics ours), *reprinted in* 1990 U.S.C.C.A.N. at 799-800.

When the conference committee blended the provisions of S 686 and HR 1465 to create OPA 90, it incorporated verbatim section 106(e) of S 686. This subsection was renumbered section 1018(c) in OPA 90. The Senate Report on S 686 explained section 106(e) as follows:

> "This subsection reinforces the position stated clearly elsewhere that *no aspect of state oil spill programs is preempted*, including the authority to impose additional requirements or penalties." S. Rep. No. 101-94, 101st Cong., 1st Sess., p. 18 (1989) (italics our), *reprinted in* 1990 U.S.C.C.A.N. at 740.

The Government focuses on the sentence that the conference committee substitute does not disturb *Ray v. Atlantic Richfield Co.* U.S. Pet. at 20. The reference to *Ray* actually confirms the broad scope of section 1018. *Ray* held that only the field of tanker design and construction was preempted. Section 4115(a) of OPA 90 imposes a design requirement of double hulls. Since nothing in the Act prevents states from imposing additional requirements, the language might allow states into the area of design and construction. The reference to *Ray* indicates that the conference committee did not intend this result.

The Government's argument that the BAP rules frustrate the objectives of Congress is based on a view that Congress' main objective was international uniformity. OPA 90 refutes this claim. In addition to requiring double hulls, Congress also required additional protection measures for foreign flag tankers operating in United States waters. *See supra* p. 7-8. OPA 90 also departed from the international regime in liability, compensation, and financial responsibility. Congress' main concern was preventing oil spills from tankers, not conforming to international standards.

Moreover, the claim of international uniformity is illusory. The Government points out that flag states are responsible for issuing certificates certifying that ships registered under their flag comply with international standards. However, there are many "flags of convenience" which maintain an open register. This allows any vessel to be registered under the country's flag even though it has no connection with the country. In many open registers the flag state does have the capability of supervising the safety of ships. As Lord Donaldson's report[18] concluded in 1994, four years after OPA 90:

> "The vice of 'open' registers is twofold. First, in practice they lead to varying standards of safety. . . . Second, the existence of 'open' registers and the consequent ease with which ships can be transferred to a different register and flag has lead to some shipowners shopping around for the registers which have the lowest standards of enforcement and which, in consequence, involve them in the least expense." Lord Donaldson, ¶ 6.12

This lack of uniformity was echoed in 1996 by the Organisation for Economic Co-operation and Development[19], which stated:

> "In spite of this tightening-up process, shipping is still a largely free market which allows considerable scope for shipowners, *inter alia*, to: i) determine vessel operating policy including the level of expenditure on safety-related maintenance cost items, and ii) avoid compliance with internationally agreed rules and

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[18] Lord Donaldson, London:HMSO, *Safer Ships, Cleaner Seas* (May 1994).

[19] Directorate for Science, Technology and Industry Maritime Transport Committee, Organisation for Economic Co-operation and Development, Paris, *Non-Observance Of International Rules And Standards: Competitive Advantages* (January 1996).

regulations as regards safety and the protection of the marine environment." Directorate, at 3 (italics theirs).

Thus, allowing states to apply their health and safety laws to oil tankers does not impair a uniform international system, because international uniformity is lacking.

2. The Court Of Appeals Decision That There Is No Conflict Preemption Does Not Conflict With *Ray*

The Government argues that the Court of Appeals decision conflicts with *Ray* because *Ray* requires preemption under Title I of the PWSA whenever a national standard exists in a federal statute or regulation addressing the same subject matter as the state requirement. U.S. Pet. at 15. *Ray* analyzed two requirements under Title I. It struck down the law that banned tankers of 125,000 DWT from Puget Sound.[20] The reason the Court invalidated the requirement is that the Coast Guard had adopted a rule that permitted these so called super tankers on Puget Sound. *Ray*, 435 U.S. at 174-75. Since it was impossible to comply with both the Coast Guard rule and the state law, the state law was preempted.

On the other hand, the Court upheld the requirement for a tug escort, because there was no Coast Guard rule. However, the Court did not conclude that the adoption of a Coast Guard rule would necessarily preempt the tug escort requirement. *Ray*, 435 U.S. at 172 ("It may be that rules will be forthcoming that will pre-empt the State's present tug-escort rule, but until that occurs, the State's requirement need not give way under the Supremacy Clause."). The question of preemption ultimately would turn on whether it was possible to comply with both the Coast Guard and state tug escort rule.

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[20] The Court also struck down this provision as a design requirement under Title II of the PWSA. *Ray*, 435 U.S. at 175-76.

3. The BAP Rules Are Consistent With Federal Law And International Standards

The United States' petition sets out examples of BAP rules it claims are inconsistent with federal law and international standards. U.S. Pet. at 17-20. This argument is not well taken. The BAP rules are consistent with federal and international standards. In some cases they are virtually identical. The BAP rules are also consistent with the intent of Congress to prevent oil spills from tankers.

Wash. Admin. Code § 317-21-200(1)(a)
Navigation Watch—Restricted Visibility

Wash. Admin. Code § 317-21-200(1) provides that the navigation watch shall consist of two licensed deck officers. This is the same requirement imposed by 33 C.F.R. 164.13(c), which was adopted as a result of OPA 90. *See supra* p. 8. The only difference is that when the master or officer in charge determines the tanker is operating in restricted visibility a third deck officer shall be added. Wash. Admin. Code § 317-21-200(1)(a).

This requirement is fully consistent with federal law and international standards. The federal rule does not prohibit a third officer during restricted visibility and under international standards prudent seamanship may require it. The Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS) were implemented by the Coast Guard in 33 C.F.R. Part 81. The term "restricted visibility" is defined as "any condition in which visibility is restricted by fog, mist, falling snow, heavy rainstorms, sandstorms or any other similar causes". 33 C.F.R. Part 81, Rule 3(l). The rules require that every "vessel shall have due regard to the prevailing circumstances and conditions of restricted visibility when complying with the Rules". *Id.* at Rule 19(c). Similarly, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW) provides: "When deciding the composition of the watch on the bridge, which may include

appropriately qualified ratings, the following factors, *inter alia*, shall be taken into account: . . . weather conditions, visibility and whether there is daylight or darkness." STCW § A-VIII/1.17.2.

A prudent master complying with international standards may well choose to have a third deck officer on the bridge during restricted visibility, but others may not. Given the difficulty of navigation in Puget Sound, Washington requires the third deck officer in limited circumstances. This requirement is consistent with federal law and international standards and is an important step in preventing collisions and groundings.

The Government also complains that the sensible step of having a third licensed deck officer in restricted visibility violates the international rules for crew rest, such that additional crew members would have to be flown to the vessel before entering Washington waters. This claim is wrong. First, the requirement only applies during restricted visibility, and since the third officer may be a pilot, an extra deck officer from the tanker's crew is needed only in the 60 miles between buoy J and Port Angeles where pilotage waters begin. Second, the rules for rest would not prohibit a licensed deck officer from fulfilling the requirement. The STCW provides: "The requirements for rest periods laid down in paragraphs 1 and 2 need not be maintained in the case of an emergency or drill or *in other overriding operational conditions*." STCW § A-VIII/1.3 (italics ours). Restricted visibility is an overriding operational condition. Of course, additional rest for a crewman might be required later, but this does not mean that the vessel needs to provide additional crew to come to Washington.

Wash. Admin. Code § 317-21-235
Drug and Alcohol Testing and Reporting

In OPA 90 § 4103(a)(1), Congress required the Secretary to adopt drug testing and reporting rules. Washington applies the Coast Guard rules for United States flagged tankers to foreign flagged tankers. In addition,

Washington requires random drug and alcohol testing for all. This requirement applies only to vessels covered by a plan filed with the Department of Ecology. Washington has extended the drug and alcohol requirement to foreign flagged vessels because a drug-impaired or intoxicated crew member of a foreign flagged vessel is just as likely to cause a collision or grounding as a drug-impaired or intoxicated crew member of a United States flagged vessel. Both could cause an oil spill. There are no international requirements relating to drug and alcohol abuse. STCW § B-VIII/2, Part 5 referred to by the Government (U.S. Pet. at 18 n.11) provides only guidance. It does not even purport to impose a requirement on flag states. Given that alcohol was a significant issue in the *Exxon Valdez* spill, the Washington drug and alcohol rule is a prudent requirement to prevent oil spills.

The Government also expresses the concern that the laws of some nations prohibit the testing required by Washington. This concern is unfounded. The record in this case establishes that Washington waives the requirement if the testing and reporting violate the laws of the flag state or if enforcing the requirement would cause noncompliance with an existing collective bargaining agreement. Second Aff. Stanley J. Norman at 4, SER at 661.

Wash. Admin. Code § 317-21-230
Training

Since 60 to 80 percent of marine casualties are caused by human error, training is vital in preventing oil spills. Wash. Admin. Code § 317-21-230 sets out training requirements. The Government claims that this training goes beyond the international standards and would require crews to be flown to Washington for training. This is simply wrong. In fact, Wash. Admin. Code § 317-21-230 is very similar to the training required under the STCW. *See* STCW §§ A-II/2 (specifications of minimum standard of competence for masters and chief mates on ships of 500 gross tonnage or more); A-III/2 (specifications of minimum standard of

competence for chief engineer officers and second engineer officers on ships powered by main propulsion machinery of 3,000 kW propulsion power of more); A-II/1 (specifications of minimum standard of competence for officers in charge of a navigational watch on ships of 500 gross tonnage or more); A-III/1 (specifications of minimum standard of competence for officers in charge of an engineering watch in a manned engine-room or designated duty engineers in a periodically unmanned engine-room); A-IV/1 (specifications of minimum standard of competence for GMDSS radio operators); A-VI/1 (mandatory minimum requirements for familiarization and basic safety training and instruction for all seafarers); A-VIII/2, Part III (Watchkeeping at sea).

Wash. Admin. Code § 317-21-250(1) Language

Washington requires that licensed deck officers "speak a language understood and spoken by subordinate officers and unlicensed crew". Wash. Admin. Code § 317-21-250(1). Communication is vital in preventing accidents. If a deck officer gives an order that is not understood, the result could be an oil spill caused by a collision or grounding. Under the Washington requirement, an officer must be able to communicate with the crew on the officer's watch or crew the officer supervises. This also is the international standard which requires licensed deck officers to "perform the officer's duties also with a multi-lingual crew". STCW A-II/1 tbl. at 7 (English Language). Once again, Washington is consistent with the international standard.

E. The Court Of Appeals Correctly Concluded That The Coast Guard Lacked The Authority To Declare That State Laws Are Preempted

In adopting a few of its rules, the Coast Guard has made statements in the federal register that it intended to preempt state law. Intertanko and the Government make one common claim that the Court of Appeals erred in ruling that the Coast Guard lacked the authority to declare in its rulemaking that

state laws are preempted. It is certainly true that federal regulations may also preempt state law. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982). However, the Court of appeals concluded the Coast Guard was acting beyond the scope of its congressionally delegated authority. The Court looked at the intent of Congress in enacting OPA 90 section 1018 and concluded: "In view of Congress's unwillingness to preempt state oil-spill prevention efforts on its own, we find implausible the argument that it intended to delegate power to the Coast Guard to do so." *Intertanko*, 148 F.3d at 1068, Intertanko App. A at 34a. The Court of Appeals decision on this point correctly applies the decision of this Court.

The Court of Appeals looked to see whether the Coast Guard was legally authorized to preempt state law. This is exactly how this Court analyzed the question in *City of New York v. FCC*, 486 U.S. 57 (1988), which concerned a provision in the Cable Communications Policy Act of 1984, 98 Stat. 2780. The Act left cable franchising to state and local authorities who were also empowered to specify the facilities and equipment that franchisees were to use, provided such requirements were consistent with this title. In 1985, the FCC forbid local cable franchising authorities from imposing their own standards. *City of New York*, 486 U.S. at 61-62.

The first issue was whether Congress had to expressly grant an agency the power to preempt. After concluding that Congress did not have to expressly authorize an agency to preempt, the Court went on to the "second part of the inquiry [which] is whether the Commission is legally authorized to pre-empt state and local regulation[s]". *City of New York*, 486 U.S. at 66. According to the Court:

> "We have identified at least two reasons why this part of the inquiry is crucial to our determination of the pre-emption issue. 'First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers

> power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the Agency.' *Louisiana Public Service Comm'n*, 476 U.S. at 374[.]" *City of New York*, 486 U.S. at 66.

The Court of Appeals followed the analysis laid out in *City of New York* and concluded that Congress did not confer the power to preempt. This conclusion is correct. Passed in the wake of the *Exxon Valdez* oil spill, OPA 90 was a departure from the "business as usual" approach to preventing oil spills. Congress imposed stricter requirements than the minimum international standards and refused to follow the international scheme for spill liability. Congress also recognized the state's right to impose additional requirements.

CONCLUSION

For these reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

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